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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Butte)

THE PEOPLE,

Plaintiff and Respondent,

v.

ANTHONY JOSEPH LEE,

Defendant and Appellant.

C044409

(Super. Ct. No. CM015152)

Defendant Anthony Joseph Lee appeals from the trial court's order denying him custody credits against his prison sentence.

Having augmented the record on our own motion to include *all* of the pages of defendant's plea form--including the page containing his express waiver of all custody credits through sentencing, which had been originally omitted from the record on appeal--we find defendant's contention that he did not knowingly and intelligently waive his right to custody credits without merit. We shall affirm the judgment.

FACTS AND PROCEDURAL HISTORY

Following an altercation in which defendant was alleged to have kicked his girlfriend in the head, defendant was charged with corporal injury to cohabitant (Pen. Code, § 273.5,

subd. (a))¹ and assault by means of force likely to produce great bodily injury (§ 245, subd. (a)(1)). The information also alleged that defendant committed the present offense while on felony probation (§ 12022.1, subd. (f)), and that he had three prior "strike" convictions for serious or violent felonies within the meaning of the Three Strikes law.²

Defendant entered into a negotiated plea agreement by which he admitted striking his wife³ and further agreed to plead guilty to corporal injury to cohabitant, admitted the allegation that he committed the crime while on felony probation, and admitted one prior strike conviction allegation in exchange for dismissal of the remaining charge and strike enhancement allegations.

At sentencing, the trial court imposed an aggregate sentence of 10 years.⁴ In response to the court's inquiry about defendant's accrued custody credits, the prosecutor responded that defendant "has 858 actual days. He is waiving those

¹ Further undesignated section references are to the Penal Code.

² Penal Code section 667, subdivisions (b)-(i), inclusive, and section 1170.12.

³ Both the information and the probation report indicate that the victim was defendant's "cohabitant" or "girlfriend." Defendant indicated in his plea agreement that the victim was his "wife."

⁴ Defendant was sentenced to the upper term of four years for corporal injury to cohabitant, which was doubled to eight years because of his admitted prior strike (§ 1170.12, subds. (b)(1), (c)(1), to which was added a two-year enhancement for committing the offense while on probation.

pursuant to the plea agreement[,]” to which the court responded “[t]hat’s my understanding.” Later, when the court asked for the number of custody credits accrued between defendant’s guilty plea and sentencing, the prosecutor replied “[i]t’s my understanding he waived them up to sentencing,” and defense counsel said “[t]hat is correct.” Defendant received no credit for the time spent in custody between his arrest and sentencing.

DISCUSSION

Penal Code section 2900.5 provides that the total number of days a defendant spends in custody, either before sentencing or as a condition of probation, and all work time and good time credits accrued under section 4019 shall be deducted from his term of imprisonment.⁵ (§ 2900.5, subds. (a), (c).)

It is well settled that a defendant may waive custody credits as a condition of probation, or in exchange for other sentencing considerations. (*People v. Salazar* (1994) 29 Cal.App.4th 1550, 1553.) A “*Johnson waiver*” (see *People v. Johnson* (1978) 82 Cal.App.3d 183) (hereafter *Johnson waiver*)) allows a criminal defendant to waive entitlement, past or future, to the custody credits authorized by section 2900.5

⁵ Section 2900.5, subdivision (a) provides in relevant part: “In all felony and misdemeanor convictions, . . . when the defendant has been in custody, including, but not limited to, any time spent in a . . . rehabilitation facility . . . or similar residential institution, all days of custody of the defendant, including days served as a condition of probation in compliance with a court order, and including days credited to the period of confinement pursuant to Section 4019, shall be credited upon his or her term of imprisonment.”

against a jail or prison sentence. In a later case, also entitled *People v. Johnson* (but dealing with a different defendant), our Supreme Court explicitly endorsed this concept. (*People v. Johnson* (2002) 28 Cal.4th 1050, 1054-1055 ["[l]ike the Courts of Appeal that have addressed the issue, we too conclude that a defendant may expressly waive entitlement to section 2900.5 credits against an ultimate jail or prison sentence for past and future days in custody"].) (*Id.* at pp. 1054-1055.) However, "[a]s with the waiver of any significant right by a criminal defendant, a defendant's waiver of entitlement to section 2900.5 custody credits must, of course, be knowing and intelligent." (*Id.* at p. 1055.) "The gravamen of whether such a waiver is knowing and intelligent is whether the defendant understood he was relinquishing or giving up custody credits to which he was otherwise entitled under section 2900.5." (*People v. Arnold* (2004) 33 Cal.4th 294, 308 (*Arnold*).)

On appeal, defendant denies he made a knowing and intelligent *Johnson* waiver. He relies on the facts that the plea form contains "no mention of any waiver of accrued custody credits" and the reporter's transcript of the hearing at which he entered his guilty plea contains no express waiver of custody credits. He argues we must therefore infer that he did not make a "knowing and intelligent" waiver of his entitlement to the credits.

The better practice is for sentencing courts to expressly admonish defendants who waive custody credits. "A sentencing

court's failure to include such an explicit advisement will not, however, invalidate a *Johnson* waiver by which the defendant is otherwise found to have knowingly and intelligently relinquished his or her right to custody credits under section 2900.5."

(*Arnold, supra*, 33 Cal.4th at p. 309.)

Having carefully reviewed the entire record, including our augmentation of the clerk's transcript, we are confident that defendant understood he was waiving all custody credits accrued prior to sentencing as an element of his negotiated plea.

Defendant initialed and signed a form entitled "Plea of Guilty or No Contest (Felony)." He initialed the box indicating "I have read, understand, and agree" next to the following statement: "I have not been induced to enter the above plea(s) [and admission(s)] by any promise or representation of any kind, except (briefly state any negotiated settlement with the district attorney): plea guilty to [section 273.5, subdivision (a)], admit one strike, admit the [section 12022.1, subdivision (f)] allegation and execute a '*Johnson*' waiver to all time served to date of sentence. The People will dismiss the balance of the charges and remaining strikes." Defendant's attorney signed a statement at the end of the plea form attesting that he had explained to defendant each of his rights and discussed with defendant "the content, substance, and meaning of all items and paragraphs initialed by him[.]"

At the plea hearing, before accepting defendant's guilty plea, the court asked defendant if he understood the plea form, and defendant responded, "Yes." Defendant also confirmed that

he had placed his initials in each box on the form where they appear. And, although defendant indicated his attorney did not read the plea form to him, but "just told me to sign it," defense counsel told the court, "I am comfortable that he does understand, because we went by the numbers from one through the end." The court concluded defendant understood the nature and consequence of the plea.

Finally, consistent with defendant's written plea form, defense counsel confirmed at sentencing that the negotiated plea agreement included a *Johnson* waiver of all custody credits accrued prior to sentencing.

In sum, the record reflects that defendant understood that his plea agreement included a *Johnson* waiver of all custody credits accrued through sentencing. In exchange, defendant received--and well understood he was receiving--significant benefits, including the dismissal of one criminal charge and two potential strike enhancements.

There was no error.

DISPOSITION

The judgment is affirmed.

DAVIS, J.

We concur:

BLEASE, Acting P.J.

BUTZ, J.